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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SAM DURON,

Defendant and Appellant.

2d Crim. No. B217795  
(Super. Ct. No. F433142)  
(San Luis Obispo County)

Sam Duron appeals an order committing him to the Department of Mental Health for treatment as a mentally disordered offender (MDO) (Pen. Code,<sup>1</sup> § 2962). He contends the evidence is insufficient to support the trial court's finding that his commitment offense, possession of child pornography in violation of section 311.11, subdivision (a), qualifies as a crime involving an implied threat to use force or violence likely to produce substantial physical harm, as contemplated by section 2962, subdivision (e)(2)(Q). We agree. Accordingly, we reverse.

**FACTS AND PROCEDURAL HISTORY**

Appellant pleaded guilty to possessing child pornography, in violation of section 311.11, subdivision (a), and was sentenced to two years in state prison. The Board of Prison Terms (BPT) subsequently determined that appellant met the MDO

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<sup>1</sup> All further statutory references are to the Penal Code.

criteria and ordered him committed for treatment. Appellant timely petitioned for a hearing pursuant to section 2966, subdivision (b), and waived his right to a jury trial.

John F. Eibl, a forensic psychologist at Atascadero State Hospital, testified that appellant met all of the criteria for treatment as an MDO as contemplated by subdivision (d)(1) of section 2962.<sup>2</sup> Dr. Eibl reached that conclusion after interviewing appellant, speaking to members of his treatment team, and reviewing appellant's medical records, the probation officer's report for his commitment offense, and the reports of other medical professionals who had conducted MDO evaluations of appellant.<sup>3</sup>

Dr. Eibl concurred in the other medical professionals' conclusions that appellant suffered from two severe mental disorders, pedophilia and schizoaffective disorder, bipolar type. The doctor explained that "[t]he pedophilia diagnosis was primarily based on [appellant's] sexual molestation of a 9 to 12-year-old developmentally delayed female, which he took naked pictures of [*sic*] and downloaded them into his computer." The schizoaffective disorder diagnosis was based on appellant's delusions and depressive and manic behavior. The doctor noted that although appellant "acknowledges his sexual offending, . . . he also has a lack of accepting the responsibility for his own behavior."

Dr. Eibl also concluded that appellant's commitment offense, possession of child pornography, involved an implied threat of force or violence as contemplated by

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<sup>2</sup> That section provides that a prisoner shall be ordered to accept treatment as a condition of parole if, among other things: "Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections [now the Department of Corrections and Rehabilitation], and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others."

<sup>3</sup> None of these documents were offered into evidence at the hearing. Appellant believed the probation report was one of the two exhibits introduced at the hearing, yet it is not included in either of the exhibits that were forwarded to this court at his request.

section 2962, subdivision (e)(2)(Q). That conclusion was based on statements in the probation officer's report, which Dr. Eibl characterized as follows: "According to the probation officer's report on December 15th, 2006, [appellant] asked for a hug and a kiss from the underaged victim. When she refused, he placed his hand down the front of her pants and touched her vagina according to her. [¶] He also showed her a pornographic movie and request[ed] that she take her clothing off, which she did, and he removed his own clothing and rubbed his penis on top of her vagina. He then took naked digital photographs of her and downloaded the pictures into his computer." The prosecutor also referred to the probation officer's recounting of an interview in which the minor "reported that [appellant] had put lotion on her vagina, rubbed his penis on her privates [and] attempted to place his penis into her vagina but she grabbed his penis and left. And further, that he would have her masturbate him with her hand and orally copulate him as well as orally copulating her, and one occasion he ejaculated in her mouth." Dr. Eibl partially relied on that interview in concluding that appellant's commitment offense qualified him for MDO treatment because it "was part of the probation officer's report and was an act of force and violence. This was a -- an adult molesting -- sexually molesting a child." The doctor went on to conclude that (1) appellant's severe mental disorders caused or aggravated the commitment offense, (2) the disorders were not in remission and could not be kept in remission without treatment, (3) appellant had received more than 90 days of treatment for the disorders in the year preceding his scheduled parole, and (4) the disorders rendered appellant a substantial danger to others.

On cross-examination, Dr. Eibl acknowledged the probation report stated that appellant had no prior convictions other than the commitment offense. The doctor also admitted that appellant had never been charged with molesting the minor depicted in the photographs he was convicted of possessing. According to the probation report, appellant had also been charged with inducing a minor to pose for a sexual photograph, in violation of section 311.4, subdivision (c), but that count had been dismissed in exchange for his guilty plea to the charge of possessing child pornography. On redirect

examination, it was established appellant had admitted to the probation officer that he had engaged in sexual conduct with the child depicted in the photographs.

At the conclusion of the hearing, appellant argued that his conviction for possessing child pornography did not qualify as a crime involving an actual or implied threat of force or violence, as contemplated by subdivision (e)(2)(Q) of section 2962. Counsel asserted: "Certainly, the court's heard a lot of other details from the probation officer's report and they're not pleasant things to hear, but from what we've been able to see from the record, [appellant] wasn't even charged with any of these other offenses. There's no suggestion that he was charged with 288 or lewd and lascivious conduct and that sort of thing and it was dismissed at some point. [¶] The most we have is a record indicating that he's charged with one possession of pictures; and two, possessing them and having employed her somehow to use her -- this girl in making the pictures. And that charge was dismissed." Counsel then cited *People v. Green* (2006) 142 Cal.App.4th 907, for the proposition that the court cannot consider crimes of which the defendant was not convicted in determining whether the commitment offense qualifies him or her for MDO treatment.

The prosecutor responded that it was proper to consider the probation officer's statements regarding appellant's sexual molestation of the child depicted in the photographs to determine whether appellant's conviction for possessing those photographs qualified him for MDO treatment. The prosecutor argued: "Obviously, when you have a -- an adult male who's acting that way to a 12-year-old developmentally disabled girl, you have a situation where there's implied force or violence or actual force or violence. [¶] And so I believe it's proper for the court to consider the circumstances behind what happened . . . in the charged offense. And the people would submit that those circumstances indicated that force or violence was used even though this is not a listed offense."

After a brief recess, the court found that appellant met all the criteria for MDO treatment, and accordingly denied his petition. In concluding that appellant's commitment offense of possessing child pornography qualified as a crime involving an

implied threat to use force or violence as contemplated by section 2962, subdivision (e)(2)(Q), the court told defense counsel, "I don't agree with your interpretation of [Green] and how it applies to these facts. I do believe that even for an uncharged matter, the court is able to look into the underlying facts to satisfy itself pursuant to 2962 . . . (e)(2)(Q) . . . [¶] And there was enough information provided by Dr. Eibl's testimony in his review of the probation report to show that there was an implied threat of force or violence as to the underlying facts of the case. So I do find that the petitioner meets the criteria, and I will -- I will deny the petition."

### DISCUSSION

Appellant contends the order committing him for treatment as an MDO must be reversed because the offense for which he was sentenced to prison, possessing child pornography, does not qualify as a crime involving an implied threat of force or violence as contemplated by section 2962, subdivisions (e)(2)(Q). We agree.

"In order to qualify an MDO for commitment, the trial court must make a finding that the prisoner meets six statutory criteria. (§ 2962, subds. (a)-(d)(1).) Among them, the court must determine whether the prisoner's severe mental disorder was one of the causes or an aggravating factor in the commission of the crime for which he was sentenced to prison. (§ 2962, subd. (b).) The statute enumerates the crimes that qualify a prisoner for MDO treatment (§ 2962, subd. (e)) and contains a 'catch all' provision stating that a qualifying offense may include '[a] crime not enumerated in subparagraphs (A) to (O), inclusive, in which the prisoner *used force or violence*, or caused serious bodily injury . . . .' (§ 2962, subd. (e)(2)(P).) (Italics added.)" (*People v. Green, supra*, 142 Cal.App.4th at p. 911.) Also included are "crime[s] in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used." (§ 2962, subd. (e)(2)(Q).)

The MDO law, by its express terms, applies only to crimes "*for which the prisoner was sentenced to prison.*" (§ 2962, subd. (b), italics added.) Appellant was convicted of possessing child pornography in violation of section 311.11, subdivision

(a).<sup>4</sup> He was not convicted, much less charged, of engaging in lewd conduct with the minor in the photographs. Although he was initially charged with inducing the minor to pose for the photographs, that count was dismissed pursuant to a plea agreement.<sup>5</sup> Evidence that appellant committed those crimes was thus irrelevant to the determination whether he qualified for MDO treatment.

Our decision in *People v. Green*, *supra*, 142 Cal.App.4th 907, is on point. The defendant in that case was charged with making criminal threats (§ 422), felony vandalism (§ 594, subd. (a)), intentional interference with business (§ 602.1, subd. (a)) and unlawful obstruction of a peace officer (§ 148, subd. (a)(1)). He pled no contest to vandalism, and the remaining counts were dismissed. (*Green*, *supra*, at p. 909.) We concluded the defendant's crime of vandalism was not a qualifying offense under section 2962, subdivision (e)(2)(P), because it involved the use of force against an inanimate object. (*Green*, *supra*, at pp. 912-913.) In reaching that conclusion, we declined to consider threats the appellant allegedly made in the course of the vandalism because the charges relating to that conduct had been dismissed. (*Id.* at p. 913.)

For the same reason, we conclude the court erred in relying on evidence that appellant committed other crimes in addition to the offense of which he was convicted, i.e., possession of child pornography. Although it was proper for the court to

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<sup>4</sup> The statute provides in pertinent part: "Every person who knowingly possesses or controls . . . any . . . computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment."

<sup>5</sup> Appellant was charged under subdivision (c) of section 311.4 which provides in pertinent part: "Every person who, with knowledge that a person is a minor under the age of 18 years, . . . knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years . . . to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including, but not limited to, any . . . photograph . . . or any other computer-generated image that contains . . . sexual conduct by a minor under the age of 18 years alone or with other persons . . . is guilty of a felony."

look to the probation report in determining whether appellant's commitment offense qualified him for MDO treatment (*People v. Martin* (2005) 127 Cal.App.4th 970, 976), appellant cannot be committed for crimes of which he was not convicted. Contrary to the trial court's conclusion, there is simply no logical basis for a finding that the manner in which appellant possessed the photographs found on the hard drive of his computer involved an implied threat to use force or violence against anyone. Because the crime for which appellant was sentenced to prison does not meet the criteria enumerated in section 2962, subdivision (e), he cannot be compelled to accept treatment as an MDO as a condition of his parole.

The judgment (order of commitment) is reversed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Linda D. Hurst, Judge  
Superior Court County of San Luis Obispo

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